



## PRIOR PROCEEDINGS

In 1992, Petitioner was convicted of, among other crimes, first degree murder with the use of a firearm. He was sentenced to 19 years to life with the possibility of parole. (Petition at 2; attached California Supreme Court habeas petition with appended exhibits ("Pet. Ex."), Pet. Ex. A, transcript of February 24, 2010 hearing before the State of California Board of Parole Hearings ("HT") 3.)

On February 24, 2010, Petitioner appeared before the Board of Parole Hearings ("Board") for a subsequent parole consideration hearing, which is the proceeding at issue in this action. (Pet. Ex. at 6a-6c; HT, *passim*.) Petitioner was represented by counsel at the hearing. (HT 3-4.) Petitioner acknowledged that, prior to the hearing, he received a document listing his rights in connection with the parole consideration hearing and reviewed them with a counselor. (HT 6.) Petitioner and his attorney confirmed that they had met previously to discuss the hearing procedure, Petitioner's rights regarding the hearing, and the factors the Board would be considering. (*Id.*) Petitioner's attorney acknowledged that Petitioner's rights were met in connection with the hearing. (HT 7.)

During the hearing, Petitioner exercised his right to speak, and he spoke about the circumstances of his commitment offense, his prior criminal history, his conduct in prison (including disciplinary infractions, work and educational history, and self-help program efforts), the letters of support he had received, his parole plans, and the reasons why he should be released on parole. (See HT 22-50.)

1 Petitioner's counsel presented a closing argument regarding Petitioner's  
2 suitability for parole. (HT 59-62.) Petitioner made a statement  
3 regarding his desire to be paroled. (HT 62-64.)  
4

5 Following the hearing, the Board found Petitioner unsuitable for  
6 parole, concluding that he poses an unreasonable risk of danger if  
7 released from prison. (HT 65.) The Board specifically explained the  
8 reasons for its decision and set a five-year deferral period for  
9 Petitioner's further consideration for parole. (HT 65-76; hereafter,  
10 the "Board Decision.")  
11

12 Petitioner sought habeas relief in the trial court, the California  
13 Court of Appeal, and the California Supreme Court. (Petition at 6; Pet  
14 Ex.; Pet. Ex. F-H.) The trial court reviewed the record and concluded,  
15 *inter alia*, that there is "some evidence" to support the Board's  
16 decision that Petitioner constitutes a current threat to public safety.  
17 (Pet. Ex. F, January 7, 2011 order of the trial court, *citing In re*  
18 Lawrence, 44 Cal. 4th 1181, 1212, 82 Cal. Rptr. 3d 169 (2008), and *In*  
19 re Shaputis, 44 Cal. 4th 1241, 1254, 82 Cal. Rptr. 3d 213 (2008).) Both  
20 the California Court of Appeal and the California Supreme Court denied  
21 relief summarily. (Pet. Ex. G-H, February 17, 2011 Order of the  
22 California Court of Appeal, and September 14, 2011 Order of the  
23 California Supreme Court.)  
24

#### 25 PETITIONER'S HABEAS CLAIM

26

27 Petitioner does not allege any habeas claim in the Petition,  
28 rather, he directs the Court to "see" the appended copy of his state

1 high court habeas petition "for grounds." (Petition at 6.)

2  
3 In his California Supreme Court habeas petition, Petitioner argued  
4 the following "grounds for relief": (1) the evidence on which the Board  
5 relied to find Petitioner unsuitable for parole does not satisfy the  
6 Board's rules and California's "some evidence" standard, and thus, due  
7 process was violated by the Board Decision; (2) the Board violated due  
8 process by relying predominantly on the circumstances of Petitioner's  
9 commitment offense; (3) the Board's reliance on the circumstances of the  
10 commitment offense was arbitrary and capricious, because Petitioner  
11 presented evidence of rehabilitation and that he is not a present danger  
12 to society consistent with California Penal Code § 3041(a) and (b); and  
13 (4) the Board's decisionmaking process and policies violated  
14 Petitioner's state and federal constitutional protections against  
15 arbitrary and capricious governmental actions. (Pet. Ex., appended  
16 Memorandum of Points and Authorities at 2.) The Court, thus, assumes  
17 that he makes these same four arguments in this action.

#### 18 19 DISCUSSION

20  
21 California's parole scheme contemplates that a prisoner sentenced  
22 to a term of life with the possibility of parole must be found suitable  
23 for parole before a parole date can be set. California Penal Code  
24 § 3041(b) and related implementing regulations set forth criteria for  
25 determining whether a prisoner is suitable for parole. See CAL. CODE  
26 REGS. tit. 15, § 2402. The prisoner must be found unsuitable and denied  
27 a parole date if, in the judgment of the panel, he or she will pose an  
28 unreasonable danger to society if released. CAL. CODE REGS. tit. 15,

1 § 2402(a). "[T]he paramount consideration for both the Board and the  
2 Governor under the governing statutes is whether the inmate currently  
3 poses a threat to public safety and thus may not be released on parole."  
4 Lawrence, 44 Cal. 4th at 1210, 82 Cal. Rptr. 3d at 189. As a matter of  
5 California law, a finding that a prisoner is unsuitable for parole must  
6 be supported by "some evidence" that he currently poses such a threat.  
7 See *id.* at 1212, 82 Cal. Rptr. 3d at 190; Shaputis, 44 Cal. 4th at 1254,  
8 82 Cal. Rptr. 3d at 222-23.

9  
10 The claims alleged by Petitioner challenge the validity of the  
11 Board Decision under California law. As noted above, Petitioner  
12 contends that the Board did not apply its own rules and California's  
13 "some evidence" requirement properly and violated due process by relying  
14 unduly on the circumstances of Petitioner's commitment offense, to the  
15 derogation of the evidence he believes warranted a finding of  
16 suitability. Petitioner argues that he has a substantive due process  
17 right to have the Board assess his suitability for parole in compliance  
18 with California law and to assess the evidence supporting a finding of  
19 suitability adequately. Petitioner contends that the reasons given by  
20 the Board to find him unsuitable for parole do not satisfy this  
21 substantive due process right, are inadequate under California law, and  
22 are not supported by "some evidence." (Pet. Ex., appended Memorandum  
23 of Points and Authorities at 11-24.)

24  
25 In Swarthout v. Cooke, \_\_\_ U.S. \_\_\_, 131 S. Ct. 859 (2011)(*per*  
26 *curiam*), the Supreme Court considered a habeas claim that a California  
27 state prisoner's right to federal due process was violated by parole  
28 unsuitability findings that were not supported by "some evidence." The

1 Supreme Court concluded that a state, such as California, may create "a  
2 liberty interest in parole." *Id.* at 861. The existence of such a state  
3 liberty interest, however, does not give rise to a federal right to be  
4 paroled. *Id.* at 862; see also Roberts v. Hartley, 640 F.3d 1042, 1045-  
5 46 (9th Cir. 2011)(explaining Cooke). Rather, the federal due process  
6 protection for such a state-created liberty interest is limited to  
7 whether "the minimum procedures adequate for due-process protection of  
8 that interest" have been met, namely, whether the prisoner was given the  
9 opportunity to be heard and received a statement of the reasons why  
10 parole was denied. Cooke, 131 S. Ct. at 862-83; see also Miller v.  
11 Oregon Bd. of Parole and Post-Prison Supervision, 642 F.3d 711, 716 (9th  
12 Cir. 2011)("The Supreme Court held in *Cooke* that in the context of  
13 parole eligibility decisions the due process right is *procedural*, and  
14 entitles a prisoner to nothing more than a fair hearing and a statement  
15 of reasons for a parole board's decision."). This procedural question  
16 is "the beginning and the end of" a federal habeas court's inquiry into  
17 whether due process has been violated when a state prisoner is denied  
18 parole. Cooke, 131 S. Ct. at 862; see also Roberts, 640 F.3d at 1046  
19 ("If the state affords the procedural protections required by . . .  
20 *Cooke*, that is the end of the matter for purposes of the Due Process  
21 Clause.").

22  
23 In Cooke, the Supreme Court rejected the rationale of prior Ninth  
24 Circuit decisions, which found compliance with California's "some  
25 evidence" standard to be a "substantive federal requirement" under the  
26 Due Process Clause of the United States Constitution. Cooke, 131 S. Ct.  
27 at 862. Indeed, the Supreme Court unequivocally stated that "it is no  
28 federal concern . . . whether California's 'some evidence' rule of

1 judicial review (a procedure beyond what the Constitution demands) was  
2 correctly applied." *Id.* at 863; see also Miller, 642 F.3d at 716  
3 (opining that earlier Ninth Circuit decisions on the scope of federal  
4 habeas review of parole decisions have "been superseded" by Cooke).

5  
6 Cooke has clearly established that the *only* federal habeas claim  
7 available to a California prisoner found unsuitable for parole is a  
8 procedural one, *i.e.*, a claim that the prisoner was not afforded an  
9 opportunity to be heard and/or given a statement of the reasons why  
10 parole was denied. Cooke, 131 S. Ct. at 862. Petitioner does not and  
11 cannot make such a claim, as the record plainly forecloses any such  
12 contention. (See HT, *passim*.)

13  
14 The Petition asserts the types of substantive due process claims  
15 precluded by Cooke. Petitioner takes issue with the correctness of the  
16 Board's conclusion on the issue of his current dangerousness, and he  
17 asks this Court to assess the validity of the Board's underlying  
18 findings -- a task that is outside the scope of the habeas review  
19 available under 28 U.S.C. § 2254.

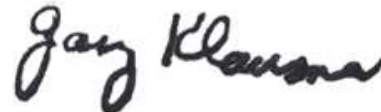
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21 Accordingly, claims such as those presented by Petitioner involve  
22 a purely state law issue and may not be considered on federal habeas  
23 review. Cooke, 131 S. Ct. at 862-63; see also 28 U.S.C. § 2254(a);  
24 Roberts, 640 F.3d at 1046 (a misapplication of the "some evidence"  
25 standard "makes no difference," because a "state's misapplication of its  
26 own laws does not provide a basis for granting a federal writ of habeas  
27 corpus"). As the claims alleged through the Petition are not  
28 cognizable, Rule 4 requires that the Petition be denied summarily, and

1 this action must be dismissed with prejudice.

2  
3 For the foregoing reasons, IT IS ORDERED that: the Petition is  
4 DENIED; and Judgment shall be entered dismissing this action with  
5 prejudice.

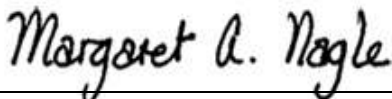
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7 In addition, pursuant to Rule 11(a) of the Rules Governing Section  
8 2254 Cases in the United States District Courts, the Court has  
9 considered whether a certificate of appealability is warranted in this  
10 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-  
11 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a  
12 certificate of appealability is unwarranted and, thus, a certificate of  
13 appealability is DENIED.

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15 DATED: October 26, 2012



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R. GARY KLAUSNER  
UNITED STATES DISTRICT JUDGE

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20 PRESENTED BY:



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MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE